

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

77-1476

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

v.

77-1476

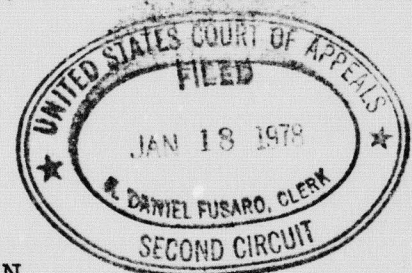
MANUEL FERNANDEZ,

Defendant-Appellant.

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B
P/S

BRIEF OF DEFENDANT-APPELLANT



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ORIGINAL

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Calendar Number _____

Docket Number 77-1476

VS.

USA

Manuel Fernandez

NOTICE OF APPEARANCE OF COUNSEL

The Clerk will enter my appearance as counsel for MANUEL FERNANDEZ

_____ ☒ Appellant ☐ Appellee

My name is SAMUEL W. GILMAN

The name of my firm, its address and telephone number are

SAMUEL W. GILMAN, 401 Broadway, New York, N.Y. Phone: (212) 349-0378

I was admitted to the Bar of this court on Approx 1968

TIME REQUEST AND ARGUMENT INFORMATION

- 1) The attorney who will argue the appeal is SAMUEL W. GILMAN
_____. If different from above, the address
and telephone number are _____
- 2) This case has been before the court previously ☐ Yes ☒ No
- 3) If yes, give reference by title and docket number _____

- 4) Kindly set argument for a date other than those I observe as
religious holy days which are _____ None

5) If any other dates will be inconvenient, state which and why

6) I request 10-15 minutes for argument. If more than 20 minutes has been requested, persuasive reasons must be stated on other side.

7) If there are more than one appellant or appellee, state (on other side) the total amount of time requested and the division of time and issues agreed upon.

☐ Multi-appellant

☐ Multi-appellee

RELATED CASE INFORMATION

To-your knowledge and that of your co-counsel from whom you are to make inquiry:

- 8) Is there any case now pending in (i) this Court, Yes _____
(ii) the Supreme Court, or (iii) any other United States Court of Appeals which involves the same, No X
substantially the same, similar or related issue(s)?
- 9) Is there any such case now pending in a District Yes _____
Court (i) within this Circuit, or (ii) in a Federal Administrative Agency which would likely be appealed No X
to the Second Circuit?
- 10) Is there any case such as (8) or (9) in which Yes X
judgment or order has been entered and the case is on its way to this Court by appeal, petition to No XXXXX
enforce, review, deny?

If answer to 8), or 9), or 10), is yes, please give detailed information.

Number and Style of Related Case _____

Name of Court or Agency _____

Status of Appeal, (if any) _____

Other Status (if not appealed) _____

Please use and attach additional sheet if necessary to give further details

1/3/78

Date

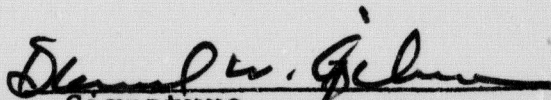

Signature
Samuel W. Gilman

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UNITED STATES COURT OF APPEALS
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UNITED STATES OF AMERICA,

v.

77-1476

MANUEL FERNANDEZ,

Defendant-Appellant.

-----x

PRELIMINARY STATEMENT

On May 3, 1977 the appellant, Manuel Fernandez, was convicted, after a jury trial, of Interstate Transportation of Stolen Property, Receipt of Stolen Property Transported in Interstate Commerce, and the crime of Conspiracy, in violation of Title 18, United States Code, §§ 2314, 2315 and 371.

On May 5, 1977 the defendant moved, in writing, for an order and judgment of acquittal or, in the alternative, for a new trial, under Rule 29 of the Federal Rules of Criminal Procedure (Index to Record on Appeal #6). That motion was denied.

The defendant was sentenced to a term of five (5) years, all but 32 weekends of which was suspended, with defendant being placed on probation for the period of non-custody. See Index #14.

QUESTIONS PRESENTED

There are basically two questions raised on this appeal:

1. Was the defendant denied the effective assistance of counsel and was he deprived of due process when the trial court, despite clear indications therefor, denied the defendant the use of a Spanish interpreter ?

2. Was the defendant denied due process and a fair trial because, due to language difficulties, counsel could not communicate with the defendant and thus failed to learn of the perjury of the Government's principal witness in time to cross-examine him effectively to the defendant's great disadvantage ?

3. Was the defendant denied a fair trial and due process by the Government's withholding of crucial information from counsel despite counsel's appropriate and timely demand for Brady material ?

4. Was the prosecutrix guilty of gross prosecutorial misconduct when she not only permitted but encouraged Government's principal witness to perjure himself and used such perjured testimony both in opening and summation with great effect, despite the belated admission that she was aware of the true facts before the perjury and deliberately failed to convey such facts to counsel ?

THE FACTS

Vincent LaMorte, the Government's principal witness and virtually only witness against defendant, testified that he, along with four others, participated in a robbery of Kahn's Oriental Rug Store in Princeton, New Jersey on May 6, 1976 (49)*. A large number of these rugs were actually stolen and then transported to Brooklyn, New York (50 et seq.). It was testified to by LaMorte that, although defendant did not participate in the actual robbery, he had selected the store to be robbed and participated in the robbery plan. In his testimony, LaMorte, speaking of defendant, said:

"Yes. He explained the whole thing, and even had a little paper where the location of the rugs would be located in the store, and mainly not to forget to take the rugs that were in the safe". (51). (Emphasis supplied).

Later in his testimony, when speaking of the actual robbery, he said:

"A. Right in the vestibule of the store itself, and Barry went over and broke the door with something, whatever it was, and then somebody says, 'Don't forget the safe. The safe first'", and Barry [g]rabbed the girl again by the throat and dragged her over to the door and asked if she would open the safe. He says 'You know you've got the combination', and she was shaking and everything. She complied. She opened the safe". (74) (Emphasis supplied).

Then (75), he said:

"A. Well, she took a little time. She was very

*Material in parentheses refers to page numbers of trial transcript

nervous, shaking about opening the safe, and finally she did, and they took -- after the safe was opened we started....taking the rugs out of the safe..." (Emphasis supplied).

It was later testified to by Mr. Kahn, the owner of the store that he knew the defendant and that the defendant had done business with him in the past, and that the last time Fernandez was in his store was 1974 (239-242). What was not known to counsel for the defendant, but what was known to the prosecutrix long prior to the trial (see: Defendant's Motion for New Trial and Government's Response in Index to Record), was that there had been no safe installed in the Kahn store until at least two years after Fernandez had last set foot in the store. (Emphasis supplied). This latter knowledge of when the safe was first installed is absolutely and unconditionally admitted by the prosecutrix. She knew it before the start of the trial and knew it at the time counsel for the defendant asked for all Brady material.

On the trial, in her opening, the prosecutrix said that Fernandez was the master-mind. That is, he [Fernandez] "told the others where to go to rob the rugs, where they could find quality goods" (20). In her summation (449-450), she made the following statements:

"He [Fernandez] told them where to go for the rugs".

"Also, LaMorte tells you that Manuel Fernandez told him, 'Go for the rugs in the safe. That's where the valuable ones are. After the robbery is announced what does Marianne LaRoche (sic) tell

you ? That's one of the first things they wanted, 'Give us the combination to the safe'. They're not leaving without the property in the safe... They went for the rugs in the safe, just as Manuel Fernandez said, just as Vincent LaMorte told you he had directed." (Emphasis supplied).

At the outset of the trial, at the commencement of the jury selection, counsel for the defendant made an application for and was granted the use of an interpreter who spoke Castilian Spanish, and the interpreter was present during the entire voir dire, although her presence at that time was not crucial, since counsel did not see fit to consult with defendant concerning the qualifications of the various members of the jury panel.

However, when the taking of the testimony was about to commence, defendant's counsel applied for and was denied the further use of an interpreter at the Government's expense, even though counsel stated he was prepared to demonstrate that the defendant was indigent and was unable to afford the hiring of an interpreter. Counsel told the court that, absent an interpreter, "it will be highly prejudicial to him [defendant]". (3-7).

Thereupon, the court, sua sponte, undertook to determine the defendant's need for an interpreter (4):

"I want him to step up before me. I want to ask him questions, some questions not pertaining to the case, and I'll find out whether he can speak English sufficiently enough (sic) (4)".

Counsel to the defendant then protested:

"Maybe your Honor doesn't understand what I said. I said I can't communicate with him because I don't understand him" (4). Emphasis supplied).

Nevertheless, the court continued by saying that he "think[s] you can communicate with him (4).

Then followed a colloquy between the defendant and the Judge studded with non-sequiturs, demonstrating beyond cavil that the defendant's knowledge of and communication in English was woefully inadequate. What the record does not set out, and no record can, was the manner in which defendant speaks and it sounds like, in the main, pure gibberish. A few excerpts from the transcript amply illustrate that counsel's need for an interpreter was valid:

THE COURT: Now, Mr. Fernandez, how long have you been in this country ?

DEFENDANT: Maybe in 1965.

THE COURT: WHAT KIND OF WORK HAVE YOU BEEN DOING ?

DEFENDANT: Well, I work for the carpet.

THE COURT: And did you have an education ? Did you go to any schools in America while you were here ?

DEFENDANT: Well, I went in the beginning a few...

THE COURT: You went to what ?

DEFENDANT: In the beginning.

THE COURT: In the beginning you went a few months to school ? What kind of a school did you go to ?

DEFENDANT: I went to me, in my house.

THE COURT: Well, was it a grammar school, a secondary school or a night school ?

DEFENDANT: No. Call the English the second language or something.

THE COURT: English secondary ?

DEFENDANT: Yes.

THE COURT: In other words, you were taught the English language there ?

DEFENDANT: Well, not very, very long.

THE COURT: In your job, did you talk Spanish or English with your fellow employees ?

DEFENDANT: I know of no employees.

THE COURT: Well, who did you work with ?

DEFENDANT: I worked with some American people.

THE COURT: And you talked English to them, didn't you ?

DEFENDANT: Well, I haven't had time to understand.

Based on this interrogation, wherein the court supplied words and thoughts for the defendant, the court found that the defendant "speaks very, very well" (5-6). Counsel's exception to the denial of an interpreter was duly noted (17).

As a result of the court's denial of an interpreter supplied at the Government's expense, and the defendant's unfortunate speech mannerisms, counsel at no time during the trial could understand what the defendant was trying to say to him; and, indeed, from time to time, shut the defendant up so that he could concentrate on the witness. When LaMorte testified about the safe, defendant tried with great vehemence to tell counsel that he never knew of a safe in Kahn's store, but counsel could not understand him and urged him to silence. (See defendant's motion for acquittal post-trial and supplemental memoranda).

During its deliberations, the jury came back for additional instructions on several occasions. It deliberated for many hours. The very last question posed by the jury to the court was whether it was necessary for the defendant to be present at the scene of the robbery in order that he be convicted. The court replied in the negative. Shortly thereafter, the jury returned with a guilty verdict.

POINT I

THE DEFENDANT WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL WHEN THE COURT DENIED HIM THE USE OF A GOVERNMENT-PAID INTERPRETER IN ORDER THAT HE BE ABLE TO COMMUNICATE WITH HIS OWN COUNSEL.

It is well recognized that, where a defendant in a criminal case is so unfamiliar with the English language that he cannot communicate his statements or cannot understand the testimony of others, he is entitled as a matter of due process and as his right to confrontation of adverse testimony and witnesses to the assistance of an interpreter. United States ex. rel. Negron v. State of New York, 434 F2d 386 (2d Cir. 1970); United States ex rel. Navarro v. Johnson, 365 F. Supp. 676 (D.C. Pa. 1973).

The defendant stood prepared to prove his indigency and his being unable to afford a privately-paid interpreter, but the court rejected the offer. It is manifestly clear from the col-

loquy between the court and the defendant that the defendant did not understand the judge, and that the judge supplied the missing spaces in the defendant's answers to conform to a pre-conceived determination not to allow the interpreter, although he had done so for the relatively unimportant voir dire of the jury. What the Judge chose to overlook was counsel's statement to the court that, regardless of the court's ability to understand the defendant and communicate with him, a truly masterful feat, counsel could not communicate with his client and that is what was important.

It is fair to say that, in refusing an interpreter, the court was guilty of an abuse of discretion and, as counsel for the defendant anticipated, it resulted in the defendant's conviction instead of an acquittal. Perovich v. United States, 205 US 89 (1907); United States v. Desist, 384 F2d 889, 902 (2d Cir. 1967) aff'd 394 US 244 (1968). The mischief lay in the fact that the only witness against the defendant was falsifying on a subject on which he could be repudiated and likely destroyed as to credibility, the matter of the safe, but, because counsel could not understand what his client was telling him, and because counsel had no idea that there was no safe in the store for more than two years after the defendant had last visited it, he had no idea to cross-examine the witness as to that matter. It is fair to say that, because of the emphasis on the safe, both by the witness and otherwise, the ver-

dict was for conviction. It is equally fair to say that, had the jury known that there was no safe in the store at the time of the defendant's last visit, it would have discredited LaMorte's testimony and would have acquitted the defendant.

Let there be no mistake. There was only one witness against the defendant, LaMorte. The FBI agent who testified for the Government actually added nothing incupatory as to the defendant. Without LaMorte, there was no case. With LaMorte discredited, there was no case.

As it has done before, the Government will attempt to argue on this appeal that defendant could have learned about the safe from one Larry Forlino, who knew the defendant and knew the layout of the Kahn store with the safe in it. This whole clumsy attempt at the wild conjecture, one which the trial court wisely rejected, that because defendant knew one Larry Forlino, therefore Larry Forlino told defendant about the safe, is a concept worthy of both Lewis Carroll and Orwell. It is respectfully urged that this Honorable court be not misled by this argument, for a reading of the record reveals it to be nothing more than surmise and wishful thinking.

The heart of the matter is that the court, in the exercise of sound discretion, should have appointed a Government-paid interpreter for the defendant. Its failure to do so was an abuse of discretion, an abuse which was underscored by what actually happened on the trial. It contributed to defendant's conviction.

POINT II

THE FAILURE OF THE PROSECUTRIX TO
TURN OVER BRADY MATERIAL AS TO A
MATERIAL MATTER OF DEFENSE REQUIRES
A REVERSAL OF THE CONVICTION.

Under Brady v. Maryland, 1963, 83 S. Ct. 1194, 373 US 83, the prosecutrix was under a duty to disclose to the defendant that she knew, before the start of the trial, that the safe in Kahn's store had not been installed until at least two years after defendant had last visited the place. The prosecutrix admittedly knew this fact. Brady material had been timely demanded. This information was not disclosed.

Had the information been disclosed, counsel for the defendant could have with great effect attacked the credibility of the Government's sole important witness and, in the posture of the case and of the jury's deliberations, he would have been discredited and the defendant would have been acquitted. The jury's question of the Judge, just prior to verdict, inquiring whether defendant had to be present at the scene of the robbery to be convicted is extremely significant. For it showed quite clearly that, if LaMorte's claim that Fernandez not only told them to go for the safe, but made and gave them a diagram of the safe, was subject to great suspicion at the very least because there had been no safe in the store when last Fernandez was there, the jury would have acquitted and disbelieved LaMorte.

It has been held that the perjury of a principal witness - and here LaMorte was the principal witness - when discovered after trial, requires the granting of a new trial. US v. Ward, CCA 3d, 1948, 168 F2d 226. It has also been held that, where reliability of a given witness may well be determinative of guilt or innocence, non-disclosure of evidence affecting credibility falls within the rule that suppression of material evidence justifies a new trial, irrespective of good faith or bad faith of the prosecution. Giglio v. US, 1972, 92 S. Ct. 763, 405 US 150.

But here, the bad faith of the prosecutrix is overwhelmingly demonstrated by her own actions and arguments. In such a case, it has been held that, where the prosecutor's suppression of evidence is deliberate, the defendant need only show that the evidence is material. It is not necessary that he show with exactitude the extent of the prejudice to him. U.S. v. Mele, CA 2d 1972, 462 F2d 918.

The prosecutrix admitted after trial (see: Index to Record, Motion to Acquit and Government's opposition papers) that she was well aware before trial that there was no safe in the store at the time Fernandez was last there. Not only did she fail to disclose this fact, either to the counsel or to the jury, but she deliberately kept that fact from the jury. It was her theory of the case that Fernandez was the mastermind of the whole incident. In her opening to the jury, she told the jury that she would prove that Fernandez told them (the robbers) where the quality goods were.

She encouraged LaMorte to testify about the safe and she made sure to include LaMorte's statement that Fernandez admonished them not to forget the goods in the safe. She elaborated on the safe testimony when she had LaMorte testify that one of the robbers said not to forget about the safe. She even used Ms. La Riche, the store clerk, and obviously a woman of refinement and delicacy, to testify how she was tortured by the robbers to reveal the combination to the safe. The whole case was built squarely around the safe; and the prosecutrix had the monstrous temerity to say that she didn't think the fact that there was no safe when last Fernandez was in the store was of any importance. But her guilt of deliberate suppression of evidence is clear and convincing. If she didn't think that whether or not Fernandez knew about the safe was of any importance, why did she attempt to introduce testimony that there was a Larry Forlino, who knew Fernandez, and also knew that there was a safe in the store, so that an inference might be drawn that Forlino told Fernandez all about the safe. This bit of whimsey was scotched aborning by the trial Judge, for it was an insult to anyone who pretends to the most basic rules of evidence.

She went so far as to say that Fernandez went to the store in Princeton the night prior to the robbery. How did LaMorte know this ? He was told by someone.

Brady v. Maryland, supra, stands for the proposition that the suppression by the prosecution of evidence favorable to a defendant who has requested it violates due process where the evidence is material with respect to guilt. Can there be any doubt that the material concerning the safe was material to the defendant's guilt? It was central to the prosecution's entire case. This material was both exculpatory and a direct attack on the credibility of the Government's principal witness. See: Gates v. Maryland, 386 US 66 (1967); U.S. v. Miller, 411 F2d 825 (CCA 2d 1969)

The Second Circuit, in U.S. v. Stassi, 544 F2d 572, said:

"The thrust of United States v. Agura, 427 U.S. 97 (1976) is that in the context of the entire record, the omitted evidence must raise a reasonable doubt as to the defendant's guilt".

Take into account the uncertainty of the jury and the number of additional instructions it required. Take, for example, the very last instruction, wherein the jury was told that the defendant need not be present at the scene of the crime in order to be found guilty. With such a state of mind, it is clear that the jury was far from convinced of the defendant's guilt beyond a reasonable doubt. No one can be heard to argue seriously that, in view of the great part played by the store safe in the entire case, had the jury known that there had not even been a safe in the store when the defendant was last there the verdict would have been not guilty.

The defendant had no way of knowing, prior to the actual testimony, that the question of the safe would be introduced and actually become vital. There was no way that the defendant could have compelled disclosure of a matter of whose existence he was ignorant and which he did not know would be used at the trial. Thus, while it may be true, as a matter of law, that a defendant is required to use due diligence in ascertaining vital facts before trial, it was impossible for him to do so here for he could not anticipate this particular move of the prosecution. See: United States v. Natale, 26 F2d 1160 (CCA 2d 1970), cert. denied, 425 U.S. 950 (1976); Gales v. Maryland, 386 U.S. at page 96.

POINT III

THE JUDGMENT OF CONVICTION SHOULD BE RE-
VERSED AND THE DEFENDANT SHOULD BE GRANTED
A NEW TRIAL.

What is complained of here cannot be swept away as being "harmless error". While one cannot pierce the minds of the jurors, the only reasonable conclusion that can be drawn is that, if counsel knew that there had been no safe until some long time after defendant had last been in the store, his cross-examination of the Government's principal witness would certainly have cracked his credibility and, more likely, would have shattered it.

Respectfully Submitted,

SAMUEL W. GILMAN
Attorney for Defendant-Appellant

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff

against

MANUEL FERNANDEZ,

Appellant- Defendant

Index No. 77-1476

AFFIDAVIT OF SERVICE
BY MAIL

STATE OF NEW YORK, COUNTY OF New York

ss.:

The undersigned being duly sworn, deposes and says:

Deponent is not a party to the action, is over 18 years of age and resides at

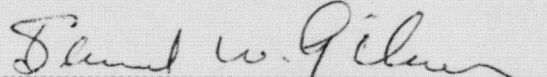
300 Belmont Avenue, Ocean, New Jersey 07712.

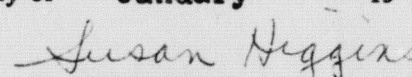
That on the 3 day of January 19 78 deponent served the annexed

Appellant's Brief
on Hon. David G. Trager, United States Attorney Eastern District of NY
attorney(s) for United States of America
in this action at 225 Cadman Plaza East, Brooklyn, New York 11201
the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed
in a postpaid properly addressed wrapper, in — a post office — official depository under the exclusive care
and custody of the United States post office department within the State of New York.

Sworn to before me

this 3 day of January 19 78


The name signed must be printed beneath
Samuel W. Gilman


SUSAN HIGGINS
Notary Public, State of New York
No. 03-4512817
Qualified in Bronx County
Certificate filed in New York County
Commission Expires March 30, 1979